SUPREME COURT, U. S.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 657

JADIE S. ADAMS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on November 5, 1958.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the United States Court for the Middle District of Alabama (R. 361) and the judgment denying petitioner's post-trial motion (R. 379) are unreported and are printed in Appendix "B" hereto, *infra*, page 2a. The opinion of the Circuit

Court of Appeals, printed in Appendix "A" hereto, *infra*, page 1a, is reported in 260 F. 2d 467.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 5, 1958. (P. 1a, *infra*) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Has the Federal Tort Claims Act been properly applied when construed to deny compensation to a motorist who was struck from behind while turning right off a four-lane thoroughfare at a speed of 5 to 10 miles per hour by a conceded negligent government driver, following too closely, and acting within the scope of his employment, who knew the motorist intended to make a right turn?

2. Where no public policy or national security considerations are involved, may a plaintiff be denied the opportunity to inspect official government investigations and reports of an automobile accident made the subject of a suit under the Federal Tort Claims Act?

3. May a United States District Court in a case under the Federal Tort Claims Act decline to give any weight to the government's answers to plaintiff's interrogatories regarding the existence and nature of plaintiff's contributory negligence?

STATUTES AND ORDINANCES INVOLVED

1. Federal Tort Claims Act (28 U.S.C. 1346(b) and 2671 et seq.)—Appendix "C".

2. Rules 52(a), 34 and 33 of the Federal Rules of Civil Procedure.

3. Title 36, Sections 15 and 16(a), Code of Alabama 1940.

4. Code of City of Montgomery 1952, Chapter 18, Sections 98(b); 56(a); 87(c).

STATEMENT

Petitioner, aged 59, suffered undisputed severe and permanent neck and back injuries, and special damages exceeding $4,000, when the automobile which she was driving was struck from the rear by a United States Air Force vehicle driven by one Airman Frank Collins, admittedly an employee of the United States, acting within the scope of his office and employment. She sued the United States under the Federal Tort Claims Act. (28 U.S.C., Secs. 1346 et seq. and 2671 et seq.) The district court found that Collins negligently followed petitioner more closely than was reasonable and prudent having due regard to the speed of petitioner and the traffic and condition of the street,[1]

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[1] Title 36, Section 15, Code of Alabama 1940; Code of City of Montgomery, 1952, Chapter 18, Section 98(b):

> "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard to the speed of such vehicle and the traffic upon and condition of the highway."

Counsel have agreed that since the district court admitted in evidence all relevant sections of the Montgomery City Code (R. 356), any portion of that Code may be cited in briefs as though incorporated in the record.

and that this negligent conduct proximately caused petitioner's injuries and damages. Respondent has never questioned this finding.

Because he found that petitioner had failed to execute properly the right turn which she was making at the time her automobile was struck, and because he found that petitioner had failed to give the required right turn signal, the district judge denied recovery.[2]

The Court of Appeals affirmed, with an unelaborated and ambiguous one sentence observation: "After carefully studying the testimony and exhibits, we hold that such findings are not clearly erroneous." That Court did not hold that the findings of the district court were correct.

Petitioner, west bound on a 45-foot four-lane thoroughfare, was struck from the rear by the westbound government vehicle while she was in the process of making a right turn from the boulevard. The inside right lane for traffic proceeding west is approximately 13 or 14 feet wide; the only traffic light facing westbound vehicles near this intersection is approximately 70 feet east of it.

Despite the district court's finding that unquestioned severe and permanent effects of the accident proximately resulted from the negligence of respondent,

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[2] "Both the approach for a right turn and a right turn shall be made as close as practicable to the right hand curb or edge of the roadway." Title 36, Section 16(a), Code of Alabama 1940, as amended; Code of City of Montgomery 1952, Ch. 18, Sec. 56(a).

"A signal of intention to turn right or left when required shall be given continually during not less than the last 100 feet traveled by the vehicle before turning." Code of the City of Montgomery, 1952, Ch. 18, Sec. 87(c).

and despite the holding that the Federal Tort Claims Act applied, petitioner was denied compensation because the district court thought she had been contributorily negligent.

Petitioner's Version of the Accident

Petitioner was proceeding west on Bell Street and had planned to turn on Eugene Street to deliver a passenger who lived there.[3] (R. 120) The light facing her just prior to Eugene Street, the light on the corner of Coffee and Bell, was red as she approached it and she slowed her car.[4] It changed to green, (R. 120) but petitioner did not increase her speed from 10 miles per hour because she knew that she had to make a turn. Suddenly there was a blow in the back of her car, and she thought "the back end of my car had fell out." (R. 122) She was in the extreme right lane, next to a fire station, as she approached the light. She used a mechanical signal to indicate a right turn (R. 123) as she came down the hill toward the red light. (R. 138-139) "[A] good distance before I got to the light, I turned that signal on to let the cars behind know . . . I was making . . . a right turn." (R. 139-140) As she went under the light, it had just changed. (R. 140) She remained in the extreme right lane to make her right turn on Eugene. (R. 141)

Contrary to the district court's finding, Mrs. Adams told the court that she had given a signal at a distance which the court measured as 60 feet from the light.

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[3] This passenger was living in Oakland, California at the time of trial, and hence was unavailable. (R. 137)

[4] This light is identified on Plaintiff's Exhibit 2-C.

This is obviously the light which was facing her, as indicated by her repeated references to approaching "the light"[4] and the light having changed.[5] That light, according to the diagram, was approximately 70 feet from the corner of Eugene Street. Thus, even as the court viewed Mrs. Adams' testimony, she gave the right turn signal for approximately 130 feet.[6]

Two investigating police officers testified that Collins admitted at the scene of the accident that he was following petitioner down the same lane, saw that she was stopping, and that he thought that he would have room to go around her but didn't and hit her in the rear.[7] Collins told Officer Henson (R. 105) that he was following the car "and he didn't notice whether it was slowed up or not, and the car didn't—slowing up to make the right turn, and when it did, the fellow didn't have time to miss it, is what he told me."[8] Collins told Air Force investigators that he "misjudged the distance between my vehicle and the Ford, for I did not cut sharply enough to the left to avoid striking it." (R. 32)

Collins pleaded guilty in Traffic Court to the charge of following too closely. (R. 321) At no time prior to

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[5] R. 120; 121; 122; 139; 140; 141; 156; 157; 160.

[6] The United States Attorney re-emphasized this: "When you got to this corner, just before, after passing the light which is there at the corner of Coffee Street and Bell Street, I believe that is correct, isn't it, there is a light, *the light going to the west is at the corner of Coffee Street and Bell Street,* and Coffee is a little offset to the east of Eugene Street; is that correct?" A. "Yes, sir; I see." (R. 160-161) (Emphasis supplied)

[7] R. 55-56; 105-106.

[8] See also Henson's answer to Court's question. (R. 115-116).

the trial did Collins say that petitioner had not given a right turn signal, although he had occasion to do so when giving two reports to the Government (R. 31-32); when questioned by the police officers; in Traffic Court; and when investigated by Air Force personnel. (R. 353) Nor did he say to any of them that petitioner had stopped suddenly in front of him.

Moreover, on eight separate occasions[9] at the trial, the government driver, Collins, testified that he knew petitioner was going to make a right turn off the thoroughfare.

Officer Farnell[10] and the Government's answers to interrogatories[11] placed the point of impact in the extreme right westbound lane.

In short, petitioner was struck from behind as she was making a right turn because the government driver Collins was following too closely, and at excessive speed in the circumstances. Collins admitted that he knew petitioner was going to turn right. She gave a right turn signal for the required distance and never left the right lane. She did not stop suddenly.

The District Court's Version of the Accident

The district court found that Collins was negligent in following too closely. That court also found that petitioner swerved to the left before making her right

[9] R. 308; 310; 316; 327; 328; 332.

[10] R. 58; 59; 63-64.

[11] Answers to Interrogatories 31 (R. 29); 32 (R. 29-30); 36 (R. 30); 38 (R. 31-32); 46 (R. 33). All answers to plaintiff's interrogatories were introduced in evidence. (R. 238-239)

turn and that she failed to give the right turn signal for the distance required by statute and ordinance. These actions he found proximately contributed to the accident even though the driver admitted knowledge of the contemplated right turn, and on this basis he denied recovery. The trial judge also found that the impact took place in the left and not in the right lane for westbound traffic on Bell.[12]

The Point of Impact

The district court's finding that the point of impact was in the left lane for westbound Bell traffic is without any support in the evidence and conflicts squarely

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[12] The court found that Collins was traveling at a speed of 10 to 15 miles per hour and that Mrs. Adams' automobile "being turned to the right on Eugene Street off Bell Street" was traveling at 5 to 10 miles per hour. (R. 363) The court found that immediately prior to the impact Collins had been "for several car lengths following the vehicle being driven by the plaintiff at a distance of approximately 10 feet. The automobiles at this time were each traveling at some 15 to 20 miles per hour. As the cars, traveling in this position and at this speed, approached the point where Eugene Street intersects Bell Street from the north, the plaintiff without giving any indication or signal and by swerving into the left lane of traffic (there were two lanes of traffic in each direction along Bell Street) slowed her automobile from its speed of 15 to 20 miles per hour to approximately 5 miles per hour and commenced a turn to the right onto Eugene Street, which was a turn of more than 90 degrees. The driver of the defendant's vehicle, because he was following too closely and because he had received no signal of the plaintiff's intention to turn, was unable to stop; and, because the plaintiff had swerved into the left lane of traffic, traveling in a westerly direction on Bell Street, he was unable to miss the plaintiff's car, as he attempted to do by swerving to the left." (R. 363-364) The court also found that Mrs. Adams gave the right turn signal, by her own testimony, for only a distance of 60 feet from Eugene Street. (R. 365)

with respondent's answers to interrogatories.[13] A police officer,[14] both drivers,[15] and the government passenger put the impact in the extreme right lane. No testimony placed it in the left westbound lane.

The "Swerve to the Left"

Only the testimony of Airman Johnson, the government passenger, supports the finding of the district court that plaintiff swerved from the right lane

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[13] See note 11, supra. For example, when asked to place the point of impact (Interrogatory 46, R. 15-16), the government answered (R. 33):

> "The defendant's vehicle was located partly in the outside right lane of the four lane street and partly on the inside right lane. The point of impact apparently was very close to a line between the inside and outside right lanes of the street."

Moreover, when asked to describe any change in the direction of plaintiff's vehicle up to the point of impact (Interrogatory 36, R. 14), the government answered (R. 30):

> "Plaintiff moved from the outside right lane into a right turn from said outside right lane."

Also, (R. 30):

> "(T)he inside right traffic lane was clear."

See also government answers to interrogatories, R. 24; 29; 30; 31.

[14] See note 10, supra.

[15] Collins testified:

(1) "(A)bout half way into Eugene Street." (R. 302)

(2) The left rear corner of plaintiff's vehicle "was to the right." (R. 307)

(3) "She was in the right lane as I was following her all the way down." (R. 309)

(4) "She started to turn right . . . . I tried to avoid hitting her, I quickly pulled to the left." (R. 310)

(5) See testimony R. 327-28 and 329.

of traffic before executing her right turn. This finding is contrary to the government's answers to interrogatories;[16] to the trial testimony of both drivers; contrary to admissions by Collins at the scene of the accident; contrary to Collins' statements to Air Force in-

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[16] The Government described the accident (R. 22):

> "(T)he plaintiff suddenly stopped the Ford without giving any signal whatsoever. In an effort to avoid hitting the Ford, the driver of the Government vehicle attempted to go to the left of the Ford but was unable to turn left quickly enough to avoid a collision with the Ford."

When asked its theory of contributory negligence, the government's answer was (R. 24):

> "As the 1955 Ford reached the point where Eugene Street intersects with Bell Street, it nearly stopped, or did stop, without warning, prior to beginning a right-hand turn onto Eugene Street. The Government vehicle was approximately two car lengths behind the Ford. The Government driver immediately placed his foot on the brake, glanced into the rearview mirror and, seeing his way clear, started to turn left into the left traffic lane going west in an attempt to avoid a collision."

Again:

> "Plaintiff's automobile, at time and place of accident, was traveling in the right outside land (sic) of a four land (sic) street." (R. 29, Answer 31)

And the government stated, when asked whether plaintiff had changed direction:

> "Plaintiff moved from the outside right lane into a right turn from said outside right lane." (R. 30)

This court is not compelled to follow the trial court's disregard for the documentary evidence in this case. It has said in *U. S.* v. *U. S. Gypsum Co.*, 333 U. S. 364, 395-6:

> "(T)he witnesses denied that they had acted in concert. . . . Where such testimony is in conflict with contemporaneous documents we can give it little weight . . ."

vestigators;[17] contrary to the investigation of Lieutenant Carpenter;[18] and also contrary to the physical evidence, uncontroverted, regarding the point of impact. And the government driver knew petitioner was going to turn right.

The testimony of Airman Johnson is absolutely incredible and therefore unworthy of belief. Johnson testified that when both cars were going 15 to 20 miles an hour, and the government vehicle was following Mrs. Adams at a distance of 10 feet, Mrs. Adams began her turn and the government car "dropped further back from behind her . . . from half a car length to 10 feet behind her." (R. 349) Thus, under his testimony, the government car hit Mrs. Adams' car while Mrs. Adams' car was pulling away from the government car.

Moreover, on the assumption that Airman Johnson meant to say that both cars were going 15 to 20 miles per hour, then his testimony is that when the government car was 10 feet behind petitioner's car, Mrs. Adams "slowed down and swung in the right—in the left lane to make her turn" and then "she swung out to the left lane and back to the right." (R. 342)

This Court judicially knows that such action, at such speed, in 10 feet is a physical impossibility. An automobile traveling 15 miles an hour moves 22 feet per second; one going 20 miles per hour moves slightly more than 29 feet per second. These turn-

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[17] R. 31 and 32.

[18] "We performed an investigation of the accident, and usually in cases of a man . . . . from the pictures of . . . . looking at the accident, and things of that nature, when he hits one in the rear that way, it is following too closely." (R. 353)

ing movements simply could not have taken place under the Johnson testimony.[19]

This same witness testified on direct examination that both cars were going "about the same at the time of impact"—namely, 20 miles per hour (R. 337); on cross-examination, that respondent's vehicle gained on the petitioner's, even though they were a half car length apart (R. 342-343); and told the court that respondent's car dropped behind petitioner's from a half car length to 10 feet (R. 349), although respondent hit her.

This witness alone gives support to the finding of the district court that petitioner turned left before she turned right.

The Right Turn Signal

Contrary to the court's findings, petitioner made quite plain that her estimate of distance given to the court on questioning (R. 156-157) was from the traffic light facing her as she proceeded west on Bell.[20] If we accept the court's estimate as correct that this distance was 60 feet, and if we view the drawing which shows that the light is approximately 70 feet from the corner of Eugene Street, the distance

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[19] See *Rota* v. *Combs*, (Ala.), 99 So. 2d 692, 693:

> "A witness may be as thoroughly discredited by the inherent improbabilities of his testimony as by the direct testimony of witnesses. . . . And evidence, even though uncontradicted, need not be accepted as proof of a fact when it is contrary to all reasonable probabilities of the case."

See also, *King* v. *Brindley*, 255 Ala. 425, 51 So. 2d 870, 875.

[20] See note 7, supra.

more than satisfies the 100 foot requirement of the city ordinance.

There is conflicting evidence only on the question of right turn signal. At the trial Collins and his passenger, Johnson, stated that the right turn was not given. But Collins' testimony was a departure from his statements to the police officers at the scene of the accident when he did not mention any failure to give a right turn signal; and from his statements of the accident to his governmental superiors on February 19 and on February 25, 1957. (R. 31)

Moreover, on direct and cross examination at the trial, Collins repeatedly made it perfectly clear that he knew petitioner was going to turn right.[21]

And, even if the district court's finding of no right signal is accepted in spite of its flimsy basis, the accident could not have resulted from such an omission in view of respondent's knowledge of petitioner's intended right turn.

In summary, the overwhelming evidence; the force and effect of the testimony considered as a whole; the great preponderance of the credible testimony, including documentary evidence; and the clear weight of the testimony reveal convincingly that petitioner was not guilty of contributory negligence and that the accident

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[21] E.g. "To the best of my ability, she was going to make a right hand turn." (R. 327)

Again:

"To me it looked like she was making a right hand turn." (R. 328)

See also, note 9, supra.

was caused proximately, solely and exclusively by the fault of respondent.

REASONS FOR GRANTING THE WRIT

1. A motorist has been severely and permanently injured according to undisputed medical testimony, and has suffered substantial financial loss because her car was struck from behind while she was making a right turn off a four-lane thoroughfare going at a speed of from 5 to 10 miles per hour by a conceded negligent, and perhaps wanton, government driver, who knew she was going to make a right turn. The courts below have denied this motorist any compensation in the teeth of congressional intent:

> "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws." *Indian Towing Co.* v. *U. S.*, 350 U. S. 61, 68-69.

While the underlying problem in this case is of a factual nature, it is of significant public importance.[22] And the Federal Tort Claims Act has been improvidently construed and applied below so as to work stark injustice.

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[22] "With the expansion of governmental activities in recent years, it becomes especially important to grant to private individuals the right to sue the government in respect to such torts as negligence in the operation of vehicles." (House Report No. 2245, 77th Congress, 2nd Session, Page 7) ("The shape of the Federal Tort Claims Act was largely determined during its consideration in the course of the 77th Congress." *U. S.* v. *Spelar*, 338 U. S. 217, 220, note 9.)

Review is essential so that this court may correct the "improper administration" of the Federal Tort Claims Act and "prevent its erosion by narrow and niggardly construction." *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 509. Though *Rogers* arose under the Federal Employers Liability Act,[23] "the same or similar issues arise under . . . the Federal Tort Claims Act." (Mr. Justice Frankfurter in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 525, n. 2) See also, *Palermo* v. *Luckenback Steamship Co.*, 355 U. S. 20.

This case, involving a serious question of construction of a statute of nationwide importance, presents a question "among the most important . . . for final determination by this Court." *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 441 (Memorandum of Mr. Justice Frankfurter).

The judgment of the district court rebukes the high purpose of Congress in imposing tort liability on the United States.

> "Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or grievously harmed. Congress could, and apparently did, decide that this would be unfair when the public as a whole benefits from the services performed by Government employees."[24]

[23] 45 U. S. C., Sections 51 et seq.

[24] *Rayonier Inc.* v. *U. S.*, 352 U. S. 315, 320.

Surely this Court admonished the entire federal judiciary when it said:

> "Of course, when dealing with a statute subjecting the government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the treasury import immunity back into a statute designed to limit it."[25]

Petitioner presents a classic case for compensation. It is difficult to conceive of a more innocent victim of careless government conduct. The judgment of the district court can be explained only as stemming from a "philosophy hostile to that reflected in the legislation."[26]

A traditional purpose of certiorari is to correct such a judicial attitude which has permeated the administration of a federal statute.[27]

The effect of maladministration of the Federal Tort Claims Act is infinitely more substantial than judicial error in applying the FELA. It is reasonable to suppose that only a small fraction of FELA

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[25] *Indian Towing Co.* v. *U. S.*, 350 U. S. 61, 68-69.

[26] Mr. Justice Douglas, *Stare Decisis*, 49 Col. L. Rev. 735, 752 (1949).

[27] See e.g. the numerous grants of certiorari during the October Term, 1957 in FELA and Jones Act cases. *Stinson* v. *A. C. L. R. Co.*, 355 U. S. 62; *Honeycutt* v. *Wabash Railway*, 355 U. S. 424; *Gibson* v. *Thompson*, 355 U. S. 18; *Kernan* v. *American Dredging Co.*, 355 U. S. 426; *Ferguson* v. *St. Louis Ry.*, 356 U. S. 41; *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252; *Butler* v. *Whiteman*, 356 U. S. 271; *Sinkler* v. *Missouri Pac. R. Co.*, 356 U. S. 326; *Palermo* v. *Luckenback Steamship Co.*, 355 U. S. 20; *Weyerhauser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563.

cases are taken from the jury. The erosive construction by state and federal courts which has induced this court to grant certiorari in FELA cases only occurs in a small percentage of applications of the act. But all Federal Tort Claims Act cases come before a judge alone. And all plaintiffs who pursue the beneficent remedies of the Tort Claims Act in the Middle District of Alabama (and perhaps throughout the Fifth Circuit) will be thwarted by the unjustifiable strictures there placed on this Act. The Congressional purpose has been undermined to a far greater degree than in the FELA cases which this court has seen fit to review.

As demonstrated in the "Statement", only on the question of the right turn signal is there even a conflict of evidence. The district court's other findings are without support. But the finding of a failure to give a right turn signal, could not have contributed to this accident. Petitioner, traveling on a four-lane thoroughfare for a distance of 100 feet at 5 to 10 miles per hour began a right turn off the thoroughfare at an intersection. She was struck from behind by a government vehicle found to be following too closely at a distance of 10 feet for several car lengths at a speed of 20 miles per hour. Without dispute the government driver knew that petitioner was going to make a right turn off the thoroughfare; without dispute he misjudged the distance between his vehicle and the lead car. It is inconceivable that recovery was denied.

The facts in the cases cited by the district court to support his judgment are in sharp and meaningful contrast to those at bar. Of course, in those circumstances contributory negligence prevents recov-

ery. The magnitude of the contributory negligence in those cases reveals the flimsy basis for the judgment against petitioner.

Indeed, one of the cases, *Watts* v. *Montgomery Traction Co.*, 175 Ala. 102, 57 So. 471, held that trial court should have sustained plaintiff's demurrer to a plea that plaintiff's car had been driven down the center of the street and on defendant's street car tracks instead of on the right side of the street as provided by ordinance. The Supreme Court of Alabama commented (57 So. at 472):

> "It is plain that the ordinance in question was not intended to keep vehicles off of street car tracks, or for the protection of street car companies."

In *Murphree* v. *Campbell*, (Ala.) 97 So. 2d 892, plaintiff grabbed the steering wheel of a car in which she was riding at an excessive speed, thus causing it to collide with a car approaching from the opposite direction.

Mobile Light & Railroad Co. v. *Baker*, 158 Ala. 491, 48 So. 119, reversed a trial court for sustaining a demurrer to the defendant's plea that the plaintiff drove across the tracks in front of the approaching train without stopping, looking and listening for its approach, and that the plaintiff attempted to drive across the tracks in front of an approaching train "without exercising reasonable prudence to ascertain whether or not the car was approaching." (48 So. at 119)

Chastain v. *Brown*, 263 Ala. 440, 82 So. 2d 904, having found conflicting evidence as to whether the plaintiff's automobile was stationary on a highway at night without the lights required by statute, held improperly

refused a charge that the plaintiff was guilty of contributory negligence if his car was not equipped with such lights.

Finally, the district court cited *Turner* v. *A. C. L. R. Co.*, 222 F. 2d 337, 340 (5th Cir. 1955), where plaintiff's husband in a wrongful death action

> "'was negligent in attempting the crossing without looking to see the train approaching; he was negligent in not looking to see the train when his automobile stalled on the tracks; but the negligence that cost him his life was in delaying and attempting to start his automobile while stalled in the path of the train after he had been twice warned by his passenger of his imminent danger.'"

Reliance on the foregoing cases reveals the misapplication of Alabama contributory negligence law in the case at bar. (See also, Ground 4, infra)

Because of the judgment below, the salutary purpose of the Federal Tort Claims Act to compensate victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual state laws,[28] will be uniquely unavailing in the Fifth Circuit. The courts below are clearly out of step with other federal courts sitting in states where the same common law rule of contributory negligence obtains. (See also, Ground 3, infra)

In *United States* v. *First Citizens Bank & Trust Co.*, 208 F. 2d 280, 282-283 (4th Cir. 1953), the court sustained recovery under the Tort Claims Act when the

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[28] *Indian Towing Co.* v. *U. S.*, 350 U. S. 61, 68-69.

decedent's automobile collided with a Marine Corps wrecker which had been left standing unlighted on a highway in the nighttime. Judge Parker commented:

> "The government relies on the decisions of the Supreme Court of North Carolina which lay down the rule that 'it is negligence as a matter of law to drive an automobile along a public highway in the dark at such speed that it cannot be stopped within the distance that objects can be seen ahead of it', commonly known as the rule of 'outrunning headlights' . . . (citations) . . . It is easy, however, to press this rule too far. It was never intended to preclude an examination of the alleged negligence of the driver of the car under the rule of reasonable prudence or to provide a bomb proof haven of refuge for one who has left an unlighted death trap upon a public highway in the darkness of the night. Recent decisions of the North Carolina Supreme Court point out very clearly that contributory negligence in cases of this sort is to be judged by the rule of reasonable prudence under all the circumstances of the case and not by arbitrary rule of thumb."

A "reasonable and prudent" application of the doctrine of contributory negligence in tort claims cases would require recovery for petitioner. If this judgment stands, the Middle District of Alabama, to use Judge Parker's phrase, will become a "bomb proof haven of refuge" for government drivers who negligently strike other motorists from the rear.

But this case is precisely such a degeneration of the liberal application and administration which Congress intended for the Tort Claims Act. Restating this high congressional purpose, this Court in *United States v. Aetna Casualty Co.*, 338 U. S. 366, 383 and

United States v. *Yellow Cab Co.*, 340 U. S. 543, 554 quoted with approval Judge Cardozo's statement in *Anderson* v. *Hayes Construction Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29-30;

> "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

If this court is to prevent a gross miscarriage of justice and a denial of federally created rights; to avoid a subtle erosion of an act of Congress; and to supervise properly the federal judiciary, then a grant of certiorari is imperative to correct the erroneous decision below.

2. Because this case presents important problems under the Federal Rules of Civil Procedure, certiorari should be granted.

A. The district court in its findings, and the Court of Appeals in determining whether those findings were "clearly erroneous" within the meaning of the Federal Rules of Civil Procedure, Rule 52a, have entirely disregarded the impact of documentary evidence, in the form of the government's answers to interrogatories, on the question of petitioner's supposed contributory negligence.

When asked to describe each negligent act or omission on the part of petitioner, if any, which contributed in any manner to the accident (R. 9), the government answered (R. 24):

> "*As the 1955 Ford reached the point where Eugene Street intersects* with Bell Street, it *nearly*

stopped or did stop, without warning, *prior to beginning a right-hand turn onto Eugene Street.* The Government vehicle was *approximately two car lengths* behind the Ford. The Government driver immediately placed his foot on the brake, glanced into the rearview mirror and, seeing his way clear, *started to turn left into the left traffic lane going west in an attempt* to avoid a collision. The dirver (sic) of the private vehicle, Mrs. Adams, stated verbally that she did not actually stop prior to making the right turn, but slowed down to no more than 5 miles per hour; and, *just as she was beginning to make the right turn,* her vehicle was struck sharply in the rear by the Government vehicle." (Emphasis supplied.)

This answer conflicts entirely with the findings and theory of the district court regarding Mrs. Adams' supposed contributory negligence. Presumably he did not find that petitioner had negligently stopped where she should not have, or had slowed too suddenly.

Moreover, as pointed out in the "Statement", this documentary evidence is contrary to the district court's findings regarding the point of impact and petitioner's supposed turn to the left lane. In a fair reading it also conflicts with the finding regarding the right turn signals. And the government's stated theory of contributory negligence is that petitioner had stopped or had nearly stopped in the right lane.

The function of interrogatories to limit the scope of issues, and the weight to be given findings which conflict with such documentary answers to interrogatories, are important questions for review.

This Court has said in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395-6, construing Rule 52(a) of the Federal Rules of Civil Procedure:

> "[T]he witnesses deny that they had acted in concert . . . Where such testimony is in conflict with contemporaneous documents we can give it little weight . . ."

A highly respected commentator on federal practice thinks that a district judge may not disregard the government's admission that petitioner did not swerve into the left lane; that the point of impact did not occur there; as well as the government's sole reliance on stopping rather than turning:

> "[I]nterrogatories do serve as adjuncts to the pleadings in limiting the issues and defining the contentions of the parties, and to this extent answers should have a limiting effect on the scope of proof at the trial just as if the matters involved were stated in the *pleadings* or in *a pretrial order.*" 4 *Moore's Federal Practice,* 2d Ed., Section 33.29, pp. 2344; 2345. (Emphasis supplied)

The situation is no different where the contentions are contained in a pleading itself. *Moore,* loc. cit., p. 2346.[29]

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[29] See also *Kendall* v. *Tetley Tea Co.,* 81 F. Supp. 387 (D. Mass. 1948); *Chatman* v. *American Export Lines,* 20 F.R.D. 176, 178 (S.D. N.Y. 1956) (An interrogatory which asked the defendant to state the acts on which defendant relies for its defense of contributory negligence "is nothing more than used to be asked in a bill of particulars in a negligence action. Interrogatories are one of the devices intended to take the place of the bill of particulars.")

R.C.A. v. *Decca Records,* 1 F.R.D. 433, 435 (S.D. N.Y. 1940):

> "If . . . between the time of the answers to (the) interrogatories and the trial, defendants obtain further information, they will not be prevented from offering such further information on the trial and should under this interrogatory furnish it to the plaintiff when it is obtained."

The courts below may not ignore the governments's unamended contention regarding the vital issues in this case and the facts upon which its assertion of contributory negligence depends. Basic principles of judicial review within the contemplation of Rule 52(a) are thereby frustrated; and a cardinal purpose of interrogatories—to narrow the issues—will be lost.

B. A departure from Rule 34 of the Federal Rules of Civil Procedure dictates the grant of certiorari. Petitioner was denied an opportunity to inspect the official Air Force investigation and report of this accident, and thereby her substantial rights were seriously and adversely affected.

This action is out of harmony with the spirit and purpose of the federal discovery procedure:

> "Modern instruments of discovery serve a useful purpose, as we noted in Hickman v. Taylor (cit.). They, together with pre-trial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. *Only strong public policies weigh against disclosure.*" *United States* v. *Procter & Gamble,* 356 U.S. 677, 682. (Emphasis supplied)

Obviously there is no public policy against disclosure of facts about an automobile accident. And, the

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Aktiebolaget Vargos v. *Clark,* 8 F.R.D. 635, 636 (D. D.C. 1949):

> "In the federal courts interrogatories serve two distinct purposes; first, to ascertain facts and secure evidence, or secure information as to where pertinent evidence exists and can be obtained; second, to narrow the issues. . . . The second function may be attained by exacting admissions or obtaining commitments as to the position of an adverse party as to issues of fact, but not as to issues of law."

documents sought were reasonably calculated to lead to discovery of admissible evidence.

As appears from affidavit of counsel (R. 377-378), the government refused to permit the court below to inspect these documents prior to ruling on petitioner's motion to produce. Moreover, the government did not list Lt. Colonel Barrow when asked by Interrogatory 7 for the names of persons who had knowledge of relevant facts concerning the accident. While the U. S. Attorney stated that the identity of this witness was unknown at the time of this answer, (R. 279), it was Barrow who notified the Air Police of the accident. (R. 289). It is reasonable to assume, therefore, that the document sought in the motion to produce, and denied by the trial court, would have revealed before trial the identity of this witness, and some of the facts which he knew.

One of the witnesses to this accident, another passenger in the government vehicle, was not produced by appellee at the trial. Since the other two occupants of the vehicle testified for the government, it is not unreasonable to assume that the documents sought might have revealed knowledge by this third person of facts detrimental to the government's case and favorable to petitioner.

Clearly, if the documents had not contained matter adverse to the government's case, counsel would not have objected to inspection of the documents by the trial court. They were not said to contain secret security information.

The matter contained in these documents would have aided the discovery of truth by revealing admissible

evidence. This Court and the lower federal courts have held that government reports and investigations of accidents made the basis of tort claims suits against the United States should be produced on motion under Rule 34 for inspection by the opposing party. See *United States* v. *Reynolds*, 345 U. S. 1.[30]

Only where national security would suffer by the revelation of secret information has a declination to produce been sustained. See *United States* v. *Reynolds*, 345 U. S. 1. And in *Reynolds* this Court made quite clear that only because of the highly secret nature of the report as revealed in a letter from the Secretary of the Army and only because the reason for non-disclosure might be lost if the documents were made available for inspection by the district court, was the refusal to produce the documents upheld.

The Court of Appeals did not approve the action of the district court. It merely held that "it did not abuse its discretion."

It is difficult to understand the Court of Appeals' citation of *Hickman* v. *Taylor*, 329 U. S. 495. There the trial notes of a lawyer were sought, whereas in the instant case no such documents are involved, but instead official government reports of accident investigations. Moreover, the wide discretion which the Court of Appeals apparently gives district courts in discovery motions under Rule 34 scarcely accords with this Court's observation in *United States* v.

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[30] Lower federal court cases to the same effect are: *Cresmar* v. *U. S.*, 9 F.R.D. 203 (S.D. N.Y. 1949); *Wunderly* v. *U. S.*, 8 F.R.D. 356 (E.D. Pa. 1948); *Evans* v. *U. S.*, 10 F.R.D. 225 (W.D. La. 1950); *Firemen's Fund Co.* v. *U. S.*, 103 F. Supp. 915 (N.D. Fla. 1952); *Bentley* v. *U. S.*, 16 F.R.D. 237 (M.D. Ga. 1954).

Procter & Gamble, 356 U. S. 677, 682, that "only strong public policies weigh against disclosure."

3. The decision below conflicts with those of other circuits on important issues of construction under the Federal Tort Claims Act.

In affirming the district court judgment, the Fifth Circuit has erroneously failed to follow the correct interpretations of other circuits, namely that contributory negligence as a bar to recovery must be given a reasonable and prudent application, and moreover, that the contributory negligence of a plaintiff, in order to bar recovery, must have proximately caused the plaintiff's injuries and damages.

U. S. v. *First Citizens Bank & Trust,* 208 F. 2d 280 (4th Cir. 1953), has been cited.

Another case which conflicts with the decision below is *McConville* v. *United States,* 197 F. 2d 680, 683 (2d Cir. 1952). Here Plaintiff and wife left a party at 2:00 a.m., and while driving home, approached an intersection at 20 or 25 miles per hour.

> "Plaintiff testified that her husband, after passing over the tripper, approached the intersection slowly and began to cross only after the light facing them had changed to green. Moving into the intersection their car was struck on the left side by the army vehicle."
>
> "The only evidence derogating the finding of no contributory negligence was the report of the state toxicologist's autopsy, which disclosed that decedent's brain contained 0.274% alcohol. If we assume, *arguendo,* that such a degree of intoxication constitutes negligence under New York (statutes), and even that it establishes a prima facie case of causation, under Martin v. Herzog,

(cit.), the presumption nonetheless remains rebuttable. The evidence established a plausible and consistent interpretation of the accident as due to another's fault. Plaintiff's intoxication was irrelevant to this theory."

The decision below conflicts with *Deane* v. *United States,* 244 F.2d 776 (D.C. Cir. 1957). That decision reversed and remanded a judgment for the government which had held that the plaintiff was contributorily negligent in failing to see a slack electric cord which was lying on the floor across the entrance to a public office during business hours. Chief Judge Edgerton, for the Court, declined to use the screen "not clearly erroneous" which was so attractive to the dissenting judge in that case and to the court below.

On the issue of causation, the decision below conflicts not only with *McConville* v. *U. S.,* 197 F.2d 680, supra, and *United States* v. *First Citizens Bank,* 208 F.2d 280, supra, but with that court's own decision in *United States* v. *Bowers,* 202 F.2d 139 (5th Cir. 1953). It is undisputed in the case at bar that the government driver knew petitioner intended to turn right. How then could her negligence have proximately caused the rear end collision when she was struck as she was turning right?

In *Bowers,* the Fifth Circuit, at the behest of the government, reversed as clearly erroneous the finding that the government was negligent in failing to erect and maintain along the outer edge of a road suitable posts or other warning devices, and that such negligence was the proximate cause of the injuries which the plaintiff suffered when his car went off the road. This finding was "clearly erroneous" because

plaintiff had admitted thorough familiarity with the road, knew that there were no guard rails on it, and knew where the edge of the road was. (202 F.2d at 140):

> "Failure to warn the plaintiff could not have been negligence proximately causing his injuries when he was already so familiar with the road as to appreciate the peril."

While petitioner is aware that this Court does not ordinarily grant certiorari because of conflicts between circuit court decisions and those of district courts, the following collation of district court cases shows examples of "reasonable and prudent" application of the doctrine of contributory negligence in the judicial administration of the Federal Tort Claims Act.

In *Combs* v. *United States,* 122 F. Supp. 280, 283 (E.D. N.C. 1954), an army sergeant, driving through a posted construction zone on a highway at 40 miles per hour, struck a construction workman who was attempting to cross the highway with his back half turned toward the approaching automobile. One car had already passed; the workman looked west and east, did not see the approaching vehicle and was unaware of its approach until just before it struck him, when it was impossible for him to avoid the impact. On the issue of contributory negligence, "I am unwilling to hold as a matter of law or find as a fact that he failed to exercise due care and that such failure was a proximate cause of his injuries."

In *Stunk* v. *U. S.*, 129 F. Supp. 530, 532, (D.N. H. 1954), recovery was not denied because the plaintiff had made a "mistake of judgment (which) is not necessarily a careless mistake."

Feathersmith v. *U. S.*, 104 F. Supp. 226 (E.D. Pa. 1952), found no contributory negligence when the plaintiff's car was struck from behind by a government mail truck which was following too closely and at excessive speed in the circumstances.

Duncan v. *U. S.*, 96 F. Supp. 277 (N.D. Tex. 1951), held plaintiff not contributorily negligent even though working in a perilous position when struck by a government vehicle.

Barnett v. *U. S.*, 78 F. Supp. 186 (N.D. Fla. 1948), allowed recovery when a plaintiff left his vehicle with lights burning and motor running on the highway, but with no warning flares around the truck as required by statute.[31]

The concept of contributory negligence is not unique in Alabama. It exists in most states in this country and has been subjected to more than a century of judicial gloss. It has always been applied everywhere as a "rule of reasonable prudence", and not as an arbitrary rule of thumb. The doctrine was never intended to produce the result reached in this case.

4. Certiorari should be granted because of a refusal to follow decisions of the Supreme Court of Alabama in a case where the decision below is one as to which state laws and decisions are applicable. The sub-

[31] "The purpose of the Florida Statute, F.S.A. § 317.67, requiring the placing of flares in front of, along side of and to the rear of parked automobiles on the public highway is to give warning for the protection of other travelers upon said highway and failure to do so constitutes prima facie evidence of negligence. However, in a case such as this where the operator of the approaching automobile fully realizes that another automobile is stationary on the wrong side of the highway; and in his path of travel, he is under the duty to exercise all due diligence and precaution and to take all such action as will avoid an emergency and avert an accident."

stantive law of negligence in Alabama is supposed to obtain in this case. 28 U.S.C. Section 1346(b). When the district court denied petitioner's post-trial motion, he spoke of her "real contention" with the law of contributory negligence in Alabama. (R. 380) "The real contention" is not with the law, but with its application.

In *Triplett* v. *Daniel,* 255 Ala. 566, 52 So. 2d 184, the court observed that statutory signals must be given if it appears that the movement or operation of another's car might reasonably be affected. In that case the admitted failure to give a stop signal did not bar plaintiff's recovery when she was struck from behind by defendant's truck.

See also *McCloud* v. *Williams,* 257 Ala. 611, 60 So. 2d 339, 341, which held that a 15 mile limit ordinance on automobiles had no application

> where for more than 50 feet before defendant reaches the crossing the plaintiff and defendant are in plain view of each other and see each other."

That court observed that "[t]he rule is settled . . . that although it may be negligence to violate a statute or ordinance, it is not actionable unless it causes injury to one for whose benefit it was enacted."

This elemental concept of contributory negligence was disregarded below. The government driver knew the plaintiff was going to turn and the failure to give the turn signal could not have caused the accident.[32]

As pointed out above, the Alabama cases cited by the district court to support his judgment reveal, instead,

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[32] If the failure to give a signal will have no effect on the operation of the defendant's following car, then there is no requirement that a signal be given. Montgomery City Code, Ch. 18, Sec. 87(c).

how far from the mark he was. The magnitude of the contributory negligence in those cases proclaims the inadequate basis for the finding against petitioner. The judgment below is out of harmony with Alabama cases which invoke a reasonable and prudent doctrine of contributory negligence.

If petitioner had ridden on a railroad track without looking and had stayed there after a warning;[33] if she had grabbed the steering wheel of a speeding automobile;[34] if she had left an unlighted automobile on a highway at night;[35] if she had driven along the street on streetcar tracks;[36] then, she should not have been entitled to recovery for her consequent injuries.

But when she had been traveling on a four-lane thoroughfare for a distance of 100 feet at 5 to 10 miles per hour; when she then began a right turn off the thoroughfare at an intersection; when she was struck from behind by a government vehicle found to be following too closely at a distance of 10 feet for several

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Jones v. *King*, 211 Ark. 1084, 204 S.W. 2d 548 (There is no proximate causation where the plaintiff gave no turn signal, but where the defendant was following too closely and too fast); *Hansen* v. *Larson*, 187 Minn. 389, 245 N.W. 835, 838 ("unless plaintiff slowed down just before turning to the right, and there is no evidence that he did, the failure to give the signal could hardly have been an influence upon the operation of defendant's car."); *Waycaster* v. *Sorenson*, 124 F. Supp. 892 (W.D. Ark. 1954).

[33] *Turner* v. *Atlantic Coast Line R. Co.*, 222 F. 2d 337 (cited by District Court R. 366).

[34] *Murphree* v. *Campbell* (Ala.) 97 So. 2d 892 (cited by District Court R. 365).

[35] *Chastain* v. *Brown*, 263 Ala. 440, 82 So. 2d 904 (Cited by District Court R. 366).

[36] *Watts* v. *Montgomery Traction Co.*, 175 Ala. 102, 57 So. 471 (Cited by District Court R. 365).

car lengths at a speed of 20 miles per hour; when the government driver, who knew she was going to make a right turn, misjudged the distance between his vehicle and petitioner's, the Federal Tort Claims Act, and the law of Alabama afford compensation.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel

APPENDIX "A"

"PER CURIAM: This action arises under the Federal Tort Claims Act.[1] The District Court found the Government employee negligent in following the plaintiff's automobile too closely, but the plaintiff also negligent in failing to signal her intention to make a right turn and in swerving to the left before making that turn. It further found that the negligent operation of the automobile by the plaintiff proximately contributed to the collision and resultant injuries and damages. After carefully studying the testimony and exhibits, we hold that such findings are not clearly erroneous. Rule 52 (a), Federal Rules of Civil Procedure.

The Government furnished to the plaintiff's attorneys such statements of witnesses, photographs, and sketches as they requested, but the Court declined to permit plaintiff's counsel to inspect the official investigation and report of the accident. In so ruling, the Court did not abuse its discretion. *Hickman* v. *Taylor,* 1947, 329 U.S. 495.

Finding no error in the record, the judgment is

AFFIRMED."

A true copy

Test: /s/ EDWARD W. WADSWORTH
Edward W. Wadsworth

Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana.

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[1] 28 U.S.C.A. § 1346, et seq., § 2671, et seq.

APPENDIX "B"

(Number and title omitted)

(Filed: February 20, 1958)

The above-styled cause, coming on to be heard, was tried by the Court without a jury on February 18, 1958, upon the issues made up by the pleadings and proof. Upon a consideration of the evidence, consisting of the oral testimony of several witnesses, the exhibits, the stipulations and admissions of the parties, as reflected by this Court's pre-trial order entered in this cause on January 27, 1958, and the defendant's answers to the plaintiff's interrogatories filed with the Clerk of this Court in this cause on January 28, 1958, this Court now proceeds in this memorandum opinion to make and enter the appropriate findings of fact and conclusions of law.

The Plaintiff in this action claims under the Federal Tort Claims Act (28 U.S.C.A. 1346(b), 2674, and Chapter 171 of Title 28 of the United States Code) of the United States of America the sum of $28,000 as damages for permanent personal injuries, incidental hospital, medical and doctors' expenses, and loss of compensation from her work, all as a proximate consequence of the negligence of Frank H. Collins, an agent of the United States, in the operation of a motor vehicle within the line and scope of his agency, by running the Government vehicle into the back of the automobile being driven by the plaintiff at or near the intersection of Bell and Eugene Streets on the 16th day of February, 1957, in the City of Montgomery, Alabama. To this complaint, the defendant entered a plea of the general issue and an affirmative plea of contributory negligence.

It was stipulated by and between the parties that the accident occurred on February 16, 1957, at the place alleged by the plaintiff. It was further stipulated that at

this time and place the plaintiff, a 59-year-old woman, of Montgomery, Alabama, was operating an automobile on Bell Street at or near the intersection of Bell Street with Eugene Street; that she was immediately prior to the time of the accident operating this automobile by driving same in a westerly direction along Bell Street; that Frank H. Collins, an airman in the employment of the United States, while acting within the scope of his employment, was at that time and place operating a motor vehicle owned by the United States, and while driving the said motor vehicle within the scope of his agency, in the same direction as the plaintiff was driving along Bell Street, had a collision with the automobile being driven by the plaintiff at that time and place. This collision is the basis for this action.

From the testimony of the witnesses and the photographs of the vehicles involved taken shortly after the accident, it appears that the right front fender of the vehicle being driven by Airman Collins struck the left rear fender and bumper of the plaintiff's automobile, that was being driven by the plaintiff. It appears further that the impact was not a severe one, causing only slight damage to the left rear fender of plaintiff's automobile and not, to any perceptible extent, even bending the bumper on plaintiff's automobile. The court finds that at the time of the impact the automobile being driven by Airman Collins was traveling at a speed of from ten to fifteen miles per hour and that the speed of the automobile being driven by the plaintiff, and being turned to the right on Eugene Street off Bell Street, was from five to ten miles per hour. Regardless of the speed of the vehicles at the time of the impact, the plaintiff's automobile accelerated immediately after the impact, went all the way across Eugene Street, and stopped at an angle on a bank approximately sixty feet from the point of impact. This Court finds that immediately prior to the impact the driver of the

defendant's automobile, Collins, had been, for several car lengths, following the vehicle being driven by the plaintiff at a distance of approximately ten feet. The automobiles at this time were each traveling at some fifteen to twenty miles per hour. As the cars, traveling in this position and at this speed, approached the point where Eugene Street intersects Bell Street from the north, the plaintiff without giving any indication or signal and by swerving into the left lane of traffic (there were two lanes of traffic in each direction along Bell Street) slowed her automobile from its speed of from fifteen to twenty miles per hour to approximately five miles per hour and commenced a turn to the right onto Eugene Street, which was a turn of more than ninety degrees. The driver of the defendant's vehicle, because he was following too closely and because he had received no signal of the plaintiff's intention to turn, was unable to stop; and, because the plaintiff had swerved into the left lane of traffic, traveling in a westerly direction on Bell Street, he was unable to miss the plaintiff's car, as he attempted to do by swerving to the left.

This Court finds specifically that the driver of the defendant's vehicle in following the plaintiff's vehicle, as above related, immediately prior to this accident was guilty of negligence and was operating his vehicle in violation of Title 36, § 15 of the 1940 Code of Alabama, and Chapter 18, § 98 (b) of the 1952 City Code of Montgomery, Alabama. This Court also specifically finds that the plaintiff, according to her own testimony, failed to give the signal indicating she intended to turn to the right for the distance as required by § 87 (c), Chapter 18 of the 1952 City Code of Montgomery, Alabama. Her testimony to this effect, upon being questioned by the Court, was that she gave the signal, by the use of a mechanical blinker device, of her intention to turn for a distance not exceeding sixty feet, this distance being

estimated by the Court from the point the plaintiff designated across the courtroom. The plaintiff was, therefore, according to her own testimony, guilty of contributory negligence. See *Watts* v. *Montgomery Traction Co.*, 57 So. 471, 175 Ala. 102, and *Murphee* v. *Campbell*, 97 So. 2d 892.

This Court further specifically finds that the plaintiff, in swerving her automobile into the left lane, or the south lane for west-going traffic on Bell Street, as she turned to the north onto Eugene Street, was guilty of negligence and also violated § 16 of Title 36 of the 1940 Code of Alabama and § 56(a) of Chapter 18 of the 1952 City Code of Montgomery, Alabama. This Court further finds that the negligent operation of the automobile by the driver of the defendant, at the time and place of this accident, was a proximate cause of said accident and the injuries plaintiff complains of. However, this Court further finds that the negligent operation of the automobile that plaintiff was driving at the time and place in question proximately contributed to the collision, and, therefore, to her injuries and damages. Under the Alabama law which must be applied to this case, the fact that plaintiff is guilty of contributory negligence bars her recovery. *Mobile Light & R. Co.* v. *Baker*, (1908), 48 So. 119, 158 Ala. 491; *Chastain* v. *Brown*, (1955), 82 So. 2d 904, 263 Ala. 440; *Turner* v. *Atlantic Coast Line Railroad Company*, (5th CCA 1955), 222 F. 2d 337.

This Court concludes, as a matter of law, that it has jurisdiction of this controversy as the same is conferred by 28 U.S.C.A. §§ 1346(b), 2674, and Chapter 171 of Title 28 of the United States Code. This Court further concludes, as a matter of law, that because of plaintiff's negligence as herein related, which negligence proximately contributed to the accident which caused her injuries and damages, she is not entitled to recovery.

Judgment

In conformity with the foregoing findings of fact and conclusions of law, it is ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff have and recover nothing of the defendant and that the defendant is discharged. It is further ORDERED, ADJUDGED AND DECREED that the costs in this case be and they are hereby taxed against the plaintiff, for which execution may issue.

Done, this the 20th day of February, 1958.

/s/ FRANK M. JOHNSON, JR.
United States District Judge"

Order Denying Plaintiff's Motion to Vacate, Etc.

(Nmber and title omitted)

(Filed: March 19, 1958)

"This cause, coming on to be heard, was submitted to the Court upon the motion of the plaintiff made pursuant to Rule 52(b) and Rule 59 of the Federal Rules of Civil Procedure, seeking to have this Court amend its findings and vacate, set aside, alter or amend its judgment of February 20, 1958, or in the alternative to open the said judgment of February 20, 1958, and permit plaintiff to take additional testimony and to direct the entry of a new judgment in favor of the plaintiff. The plaintiff assigns numerous grounds in support of said motion. They may be summarized by stating that plaintiff claims the findings and conclusions of this Court, upon which the judgment of February 20, 1958, is predicated, are clearly erroneous, without substantial evidence to support them, based upon the Court's misapprehension as to the effect of the evidence, against the weight of the evidence, and contrary to the truth and right of the case.

Upon a consideration of said motion, the arguments presented in support of and in opposition to same, a review of the testimony taken on the trial of this case, this Court is of the opinion that the most that can be said for the position plaintiff now takes is that the evidence was conflicting and may have supported a judgment had one been rendered in favor of the plaintiff. However, this Court is now more firmly convinced than ever before that the plaintiff was guilty of contributory negligence in that she, according to the weight of credible testimony, failed to give any signal or indication of her intent to turn, swerved into the left lane of traffic while slowing her automobile, in which lane the point of impact occurred, and if her testimony that she did give a signal would be believed, the signal was not given for the distance as required by the City Code of Montgomery, Alabama. Plaintiff's real contention is not with the findings and conclusions of this Court but with the law of the State of Alabama which holds that contributory negligence is a complete bar to recovery.

It is, therefore, for the foregoing reasons and for good cause shown, the ORDER, JUDGMENT AND DECREE of this Court that Plaintiff's motion made pursuant to Rule 52(b) and Rule 59 of the Federal Rules of Civil Procedure, seeking to have this Court amend its findings and to vacate, set aside, alter or amend its judgment of February 20, 1958, or in the alternative to open said cause and allow Plaintiff to take additional testimony, should be and the same is hereby overruled and denied.

Done, this the 19th day of March, 1958.

/s/ FRANK M. JOHNSON, JR.
United States District Judge"

APPENDIX "C"

28 U.S.C.A. § 1346(b):

"Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C.A. § 2671:

"As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

'Federal agency' includes the executive departments, and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty. June 25, 1948, c. 646, 62 Stat. 982, amended May 24, 1949, c. 139, § 124, 63 Stat. 106."

28 U.S.C.A. § 2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983."

1952 City Code of Montgomery, Alabama, Chapter 18, Sec. 87(c):

"A signal of intention to turn right or left when required shall be given continually during not less than the last one hundred feet traveled by the vehicle before turning."

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 657

JADIE S. ADAMS, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinions of the United States District Court for the Middle District of Alabama (Pet. App. 2a-7a) are not reported. The *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a) is reported at 260 F. 2d 467.

JURISDICTION

The judgment of the Court of Appeals was entered on November 5, 1958. The petition for a writ of certiorari was filed on January 21, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court's finding that petitioner was contributorily negligent was clearly erroneous.

2. Whether the District Court, in the circumstances of this case, abused its discretion in denying petitioner's motion, under Rule 34 of the Federal Rules of Civil Procedure, for discovery of an Air Force investigative report of the accident in issue.

STATEMENT

Petitioner brought this action against the United States under the Federal Tort Claims Act to recover damages for personal injuries and loss of earnings assertedly resulting from a collision on February 16, 1957, between her automobile and an Air Force vehicle. The collision occurred while petitioner was making a right turn, at an intersection in Montgomery, Alabama, and the complaint alleged that it was proximately caused by the negligence of the Air Force enlisted man who was driving the Government vehicle. In its answer, the United States denied negligence and asserted the affirmative defense of contributory negligence.

Before trial, petitioner made a motion under Rule 34 of the Federal Rules of Civil Procedure for discovery and inspection of four documents (R. 34). One of these documents was the official report of the in-

vestigation of the accident, which had been prepared by the Air Force Staff Judge Advocate at Maxwell A.F.B., Alabama (R. 35). The other documents sought were two reports of the accident made by the Air Force driver, and the Air Force "trip ticket" relating to the trip in which the Government vehicle was engaged at the time of the accident.

Except as to the official investigation report, the District Court granted petitioner's motion with respect to all of the documents. In its order, the court determined (R. 37):

> It appears from said motion and from the statements made by counsel that the documents sought in paragraph numbered 1 of said motion constitute the entire official investigation of the accident as made by or on behalf of the defendant. This Court is of the opinion that no such requirement should be made of the defendant. The information sought in paragraphs numbered 2, 3, and 4 of said motion relate to specific items and this Court is of the opinion that said items should be furnished for the inspection and copying by the Plaintiff.

At the trial, the District Court found that the Air Force driver, in following the petitioner's car too closely, was negligent and in violation of Alabama law. The court went on to find, however, that the petitioner was also negligent (1) in failing to give the signal indicating her intention to make a right turn for the distance required by Section 87(c), Chapter 18 of the 1952 Code of Montgomery, Alabama;[1] and (2)

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[1] (c) "A signal of intention to turn right or left when required shall be given continually during not less than the last one hundred feet traveled by the vehicle before turning." Section 87(c), Chapter 18, City Code of Montgomery, Alabama.

in swerving from the outside lane into the inside lane before she made a right turn.[2] The court further found that the petitioner's negligence was a proximate cause of the accident and held that she was therefore not entitled to recovery.

The Court of Appeals affirmed (Pet. App. 1a). Citing Rule 52(a) of the Federal Rules of Civil Procedure, it held, "[a]fter carefully studying the testimony and exhibits," that the finding that the petitioner was contributorily negligent was not clearly erroneous. The court also held, on the authority of *Hickman* v. *Taylor*, 329 U.S. 495, that the District Court had not abused its discretion in declining to permit petitioner's counsel to inspect the investigation report prepared by the Air Force Staff Judge Advocate.

ARGUMENT

As the Court of Appeals correctly determined, the District Court's finding that petitioner was contributorily negligent is not clearly erroneous. There is no greater merit to petitioner's assertion, also rejected by the Court of Appeals, that the District Court abused its discretion in not permitting petitioner to inspect the investigation report prepared by the Staff Judge

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[2] In this connection, the court found that petitioner had violated Section 16 of Title 36 of the 1940 Code of Alabama, which provides:

> (a) * * * the driver of a vehicle intending to turn to the right at an intersection shall approach such intersection in the lane of traffic nearest to the right hand side of the highway, and in turning shall keep as close as practicable to the right hand curb or edge of the highway * * *.

and Section 56(a) of Chapter 18 of the 1952 City Code of Montgomery, Alabama, which provides: "Both the approach for a right turn and a right turn shall be made as close as practicable to the right hand curb or edge of the roadway."

Advocate. There is no conflict of decisions and the questions raised by the petition are not of general importance.

1. Both of the courts below have resolved adversely to petitioner the factual questions as to (1) her failure to give an adequate signal before making a right turn; and (2) the unlawful swerve of her vehicle prior to that turn. Their resolution of these questions is amply supported by the record.[3] Moreover, the concurrent findings of the two courts below are final here in the absence of exceptional error. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214. The petition fails to demonstrate that exceptional error was committed.[4]

2. Rule 34 of the Federal Rules of Civil Procedure provides:

> Upon motion of any party *showing good cause therefor* * * * the court in which an action is

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[3] On the question of petitioner's failure to signal, the petitioner herself testified (R. 156), by reference to points in the courtroom, that she turned on her signal at a distance estimated by the court to be "not exceeding sixty feet" (Pet. App. 4a) before making her turn. A passenger in the Air Force vehicle testified that he did not see the petitioner make any signal (R. 344), and the driver testified she made no signal (R. 309).

On the question of the unlawful swerve to the left, the testimony of witnesses Barrow (R. 285), Collins (R. 303), and Johnson (R. 336) supported the determination by the courts below.

[4] There is no foundation to petitioner's assertion (Pet. 21, *et seq.*) that the District Court findings were "clearly erroneous" because, in an answer to an interrogatory, the Government had stated that, without warning, petitioner had "nearly stopped or did stop" before beginning the turn. As Professor Moore has observed (4 Moore's *Federal Practice*, 2d ed., Section 33.29, p. 2345):

> * * * a party should not be bound by answers to interrogatories if subsequent investigation discloses new facts; the discovery rules are not to be used as a tactical device for tying a party down to a disadvantageous position or for suppressing facts.

> pending may * * * order any party to produce and permit the inspection and copying or photographing * * * of any designated documents * * *. [Emphasis supplied.]

In her motion under this rule for discovery of the Air Force investigation report, petitioner did not even suggest the existence of "good cause". In these circumstances, she is hardly in a position to complain that the District Court abused its discretion in declining to order production of the document.

On the basis of subsequent developments at the trial, petitioner argues, however, that the District Court was required to grant discovery. Specifically she points to the fact that the Government called as a witness the Air Force officer (Lieutenant Colonel Barrow) who had notified the Air Force police of the accident (Pet. 25). Noting that the Government had not referred to this officer in its answers to interrogatories, petitioner hypothesizes that both his name and certain relevant information in his possession would have been disclosed by the investigation report.

Aside from the consideration that the action of the District Court must be judged in the light of the situation at the time the motion for discovery was filed, and the additional consideration that petitioner did not renew her motion when Colonel Barrow testified, there is clearly no merit to petitioner's suggestion that the report would have contained any reference to Barrow. As the United States Attorney explained, Colonel Barrow was not known to have been a witness to the accident at the time the petitioner's interrogatory was answered (R. 279). This explanation was borne out by Barrow's own testimony (R. 279, 280) that he had been interviewed with respect to the accident about two

weeks before the trial,[5] *i.e.*, over a week after the Government answered petitioner's interrogatories[6] and eleven months after the completion of the accident report on April 16, 1957.[7]

In addition to the petitioner's failure to show good cause for the production and inspection of the investigation report, the Court of Appeals correctly held that the trial court was justified under the rule of *Hickman* v. *Taylor*, 329 U.S. 495, in not requiring the Government to produce the report. The Government answered petitioner's 47 interrogatories (R. 21-34), and furnished photographs and sketches of the scene of the accident to the petitioner (R. 44, 45, 46, 47, 48). The court also permitted discovery of the two reports of the accident made by the driver and the "trip ticket" (*supra*, p. 3). In view of this broad disclosure of pertinent information, it is doubtful whether petitioner can rely upon this Court's decision in *Hickman* v. *Taylor* to justify the disclosure of the work-product of the Air Force's legal staff.

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[5] The trial began February 18, 1958 (R. 43).

[6] The Government's answers were filed January 28, 1958 (R. 21).

[7] Petitioner also notes that one of the passengers in the Government vehicle was not called as a witness and speculates that the investigation report "would have revealed knowledge by this third person of facts detrimental to the government's case" (Pet. 25). This third person was Alfred V. Chapin, whose name and address were furnished the petitioner in the Government's answer to petitioner's interrogatory number 47 (R. 33). If petitioner's speculation is correct, she could have called Chapin as a witness, or at least requested the Government to furnish any statements made by him about the accident.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

ALAN S. ROSENTHAL,
WILLIAM E. MULLIN, JR.,
Attorneys.

FEBRUARY, 1959